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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/679,371	10/05/2000	Thomas J. Mohr	SWAB:003B	7751

7590 03/26/2003

PARKHURST & WENDEL, L.L.P.  
Suite 210  
1421 Prince Street  
Alexandria, VA 22314-2805

EXAMINER
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TOOMER, CEPHIA D

ART UNIT	PAPER NUMBER
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1714

DATE MAILED: 03/26/2003

16

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/679,371

Applicant(s)

THOMAS J. MOHR

Examiner

Cephia D. Toomer

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 December 2002.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 29-31 and 35-39 is/are pending in the application.
- 4a) Of the above claim(s) 29-31 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 35-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

### DETAILED ACTION

This office action is in response to the amendment filed December 9, 2002 in which claims 32-34 were canceled, claim 35 was amended and claim 39 was added. It should be noted that Applicant is correct that claims 29-31 are withdrawn and claims 32-38 have been treated on the merits.

Claims 35-39 are rejected under 35 U.S.C. 103 (a) as being unpatentable over Zelenak (us5, 814,222).

Zelenak teaches super oxygenated water containing 40-50 mg/l of oxygen (see col.3, lines 22-30). The water is used in medical solutions, such as organ transplant storage media and contact lens treating solution (saline) (see col.3, lines 31-41). Zelenak teaches the limitations of the claims other than the differences that are discussed below.

In the first aspect, Zelenak differs from the claims in that he does not specifically teach that the oxygen of his invention is atomic oxygen. However, since Zelenak is silent regarding this limitations, it would be reasonable to expect that Zelenak is silent regarding this limitations, it would be reasonable to expect that Zelenak's generic description of oxygen encompasses atomic oxygen.

In the second aspect, Zelenak differs from the claims in that he does not specifically teach that the water is prepared by the product-by-process limitation. However, the patentability of a product does not depend on its method of production. If the product in the product –by-process claim is the same as or obvious from a product

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of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *In re Thorpe*, 227 USPQ 964 (Fed.Cir.1985)

Claims 35 and 39 are rejected under 35 U.S.C. 103 (a) as being unpatentable over OXY-WATER.

OXY-WATER teaches super-oxygenated water containing 34 mg/l of dissolved oxygen (see testimonials-medical statements).

In the first aspect, OXY-WATER differs from the claims in that it does not specifically teach that the oxygen of his invention is atomic oxygen. However, since OXY-WATER is silent regarding these limitations, it would be reasonable to expect that OXY-WATER's generic description of oxygen encompasses atomic oxygen.

In the second aspect, OXY-WATER differs from the claims in that it does not specifically teach that the water is prepared by the product-by-process limitations. However, the patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior art product was made by a different process. *In re Thorpe*, 227 USPQ964 (Fed. Cir.1985)

Applicant's arguments have been fully considered but they are not persuasive.

Applicant argues, "If the oxygenated water of Zelenak '222 included stable atomic oxygen, given its novelty, Zelenak '222 would have disclosed this feature

The examiner respectfully disagrees. Zelenak is concerned with oxygenating the water and not in which form of oxygen is used. Zelenak teaches that the oxygen, which

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is recovered from the molecular sieve is "pure oxygen". Chemical dictionaries define oxygen as "O" and molecular oxygen as "O<sub>2</sub>".

Applicant argues that the present invention can be generated in the absence of a pressurized system.

Zelenak teaches that even after the dissolved oxygen content is released over a period of 24 hours that the level of oxygen is still significantly above the oxygen level of tap water (see col.7, lines 54-57). At col.3, lines 25-30, Zelenak teaches that untreated water contains 7-9 mg/l of oxygen (see col.3, lines 25-30). This teaching suggests that there is no criticality in the non-pressurized system of applicant.

Applicant sets forth for OXY-WATER the same argument regarding the term oxygen and the pressurized system as set forth in Zelenak. The examiner will not repeat her responses here but directs applicant to the arguments supra.

Applicant argues that the examiner recognizes that the term oxygen refers to molecular oxygen given the comments made in the office action regarding PO<sub>2</sub> and O<sub>2</sub> SAT.

The examiner stated that PO<sub>2</sub> and O<sub>2</sub> SAT refers to the molecular oxygen present in the super oxygenated water. The examiner has never stated that O<sub>2</sub> did not refer to molecular oxygen. Applicant has not compared the closest prior art of record to the present invention. Applicant has not shown that the super oxygenated water of Zelenak and OXY-WATER do not contain atomic oxygen.

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cephia D. Toomer whose telephone number is 703-308-2509. The examiner can normally be reached on Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Vasu Jagannathan can be reached on 703-306-2777. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0661.

A handwritten signature in cursive script, reading "Cephia D. Toomer".

Cephia D. Toomer  
Primary Examiner  
Art Unit 1714

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March 25, 2003